

Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality

T.P. GALLANIS*

Discrimination against sexual minorities pervades American law. Much of this discrimination exists in the form of "mandatory" rules denying equal rights in areas such as marriage, parenting, employment, housing, military service, immigration, taxation, and sexual privacy. Organizations and individuals within the gay, lesbian, and bisexual (GLB) community are working mightily to combat this injustice. But as Professor Gallanis argues in this Essay, the movement for same-sex equality has had too little to say about the "default" rules that likewise discriminate on the basis of sexual orientation. Using examples from the law of intestacy, health-care surrogacy, and guardianship, Professor Gallanis demonstrates how these rules can have significant and detrimental consequences, and urges the gay, lesbian, bisexual movement to view the reform of these rules as an essential prerequisite to full equality.

"Dedicated to a Happier Year"¹

—E.M. Forster, *Maurice*

The modern movement for gay, lesbian, and bisexual equality² has made

* Assistant Professor of Law and History, The Ohio State University. B.A., Yale University; J.D., University of Chicago; LL.M. and Ph.D., Cambridge University. For suggestions during the preparation of this Essay, I would like to thank the participants in faculty workshops at the University of Michigan Law School (where I was a visitor during the Fall 1998 semester) and The Ohio State University College of Law. For comments on previous drafts, I am especially indebted to Kathleen Clark, Ruth Colker, Mary Louise Fellows, Gary Spitko, and Lawrence Waggoner. For financial support, I would like to thank the University of Michigan Law School, The Ohio State University College of Law, and The Ohio State University Office of Research (Seed Grant No. 221923). Finally, I would like to thank my former conflict-of-laws teacher, Larry Kramer, for the model of concision provided by his nine-page article, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989). Law review articles should make their point and then stop.

¹ E.M. FORSTER, *MAURICE* ii (1971) (written 1913–1914 but published posthumously due to its homosexual content).

² I use this phrase deliberately. The word "modern" refers to the work of numerous scholars, including George Chauncey and the late John Boswell, who have shown convincingly that the struggle for equality did not begin in 1969. *See, e.g.,* JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY* (1980) (describing an influential gay subculture in Europe in the eleventh and twelfth centuries); GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940* (1994) (describing the lives and struggles of men in a flourishing gay community long before the 1969 Stonewall rebellion). Instead, 1969 is simply the birthyear of the movement's modern incarnation. *See, e.g.,* DONN TEAL, *THE GAY MILITANTS: HOW GAY LIBERATION BEGAN IN AMERICA, 1969–1971* (1971) (providing a riveting account of the Stonewall

tremendous progress.³ To illustrate, consider the following question: in the years before the Stonewall rebellion, how many law firms or law schools were eager to hire and promote openly homosexual or bisexual employees? The answer is none. Yet today, according to the Human Rights Campaign,⁴ seventy-three major law firms and thirty law schools offer domestic partnership benefits to employees with same-sex partners.⁵ And the current *Directory of Law Teachers* lists 191 professors or administrators (including the present author) who have voluntarily identified themselves as gay, lesbian, or bisexual (GLB).⁶ To paraphrase the Virginia Slims slogan: We've come a long way, baby.⁷

Still, much work remains to be done. Discrimination on the basis of sexual orientation pervades American law and American society. Organizations such as the Lambda Legal Defense and Education Fund,⁸ the National Center for Lesbian Rights,⁹ and the Human Rights Campaign¹⁰ are working tirelessly to improve the legal position of sexual minorities, yet the opponents of equality present formidable challenges at every turn.¹¹

The purpose of the present Essay is to suggest a law-reform strategy that has been noticeably overlooked by the organized, political arm of the GLB

rebellion and its catalytic effect on the modern gay movement). I have also purposely chosen the word "equality" rather than "rights" to make it clear, contrary to the allegations of many social conservatives, that most gay men, lesbians, and bisexuals are not seeking special rights but only the same ones that heterosexual men and women have long enjoyed. For an interesting discussion of "special rights," see Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564 (1998).

³ For a history of the movement, see, for example, LONG ROAD TO FREEDOM: THE ADVOCATE HISTORY OF THE GAY AND LESBIAN MOVEMENT (Mark Thompson ed., 1994) (chronicling the movement from the late 1960s to the early 1990s).

⁴ For information on the Human Rights Campaign, see its website: (visited Nov. 17, 1999) <<http://www.hrc.org>>.

⁵ Human Rights Campaign, *WorkNet Employer Database*, (visited Nov. 22, 1999) <<http://www.hrc.org/issues/workplac/data.html>> (providing links to lists of employers that offer domestic partner benefits).

⁶ ASSOC. OF AM. LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1299-1300 (1998-1999).

⁷ The advertising slogan for Virginia Slims cigarettes was "You've come a long way, baby." See, e.g., *Emancipated or Manipulated?*, BOSTON GLOBE, Oct. 19, 1997, (Magazine), at 7 (discussing the tobacco companies' use of advertising aimed at women).

⁸ For information on the Lambda Legal Defense and Education Fund, see its website: (visited Nov. 17, 1999) <<http://www.lambdalegal.org>>.

⁹ For information on the National Center for Lesbian Rights, see its website: (visited Nov. 17, 1999) <<http://www.nclrights.org>>.

¹⁰ For the Human Rights Campaign's website, see *supra* note 4.

¹¹ On the formidable opposition to equal rights, see generally DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* (1997).

movement. At the heart of this strategy is the distinction between default rules and mandatory rules—a distinction well-known in law schools¹² but virtually unknown everywhere else.¹³ Default rules, also called background rules,¹⁴ gap fillers,¹⁵ or rules of construction,¹⁶ are rules of law that yield to the contrary intention of the people they are designed to regulate.¹⁷ Mandatory rules, in contrast, are rules that cannot be altered by an expression of contrary intention.¹⁸ By way of illustration: the speed limit on a highway is a mandatory rule because it cannot be changed by an individual driver's whim; however, the requirement under some probate codes that beneficiaries must survive for 120 hours¹⁹ is a default rule because it can be trumped by a contrary provision in the testator's will.²⁰

The political movement for GLB equality has focused virtually all of its attention on changing rules that fall into the category of mandatory: for example, the rules governing eligibility for marriage, adoptive or foster parenting, immigration, tax and employee benefits, housing and employment protections,

¹² On March 12, 1999, I conducted the following search in LEXIS's Lawrev library, Allrev file: <"default rule" and "mandatory rule">. This search yielded 211 articles. Among these are the following classics: Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

¹³ On March 12, 1999, I conducted the same search described in the previous footnote in LEXIS's News library, Cumws file. This search yielded only two articles: Margaret Taylor, *Company Law Review Act 1998*, MONDAQ BUS. BRIEFING (Dec. 8, 1998); William W. Park, *The New English Arbitration Act*, MEALEY'S INT'L ARB. REP. (June 1998). The author of the first article is identified as a corporate partner with the Minter Ellison Legal Group in Sydney, Australia; the author of the second article is identified as a law professor at Boston University.

¹⁴ See, e.g., Craswell, *supra* note 12, at 490.

¹⁵ See, e.g., Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 737 (1991).

¹⁶ See, e.g., RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 11.3 (Tentative Draft No. 1, 1995).

¹⁷ For a succinct description of the distinction between default rules and mandatory rules, see Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 706 (1999).

¹⁸ See *id.*

¹⁹ See, e.g., UNIF. PROBATE CODE § 2-702 (1990), 8 U.L.A. (PART I) 182-84 (1998).

²⁰ See, e.g., UNIF. PROBATE CODE § 2-701 (1990), 8 U.L.A. (PART I) 181 (1998) (providing that the rules in Part 7 of the UPC, including the 120-hour requirement of survivorship imposed by section 2-702, apply only "[i]n the absence of a finding of a contrary intention").

and the like.²¹ This Essay argues that the organized movement should also attack the default rules that likewise discriminate against the GLB community. In particular, this Essay focuses on three such rules, in the areas of intestacy, health-care decisionmaking, and guardianship. If unreformed, these three default rules will have pernicious consequences for sexual minorities.

How much damage can be done by discriminatory rules that only govern by default? Part I of this Essay answers this question by putting a fresh perspective on the well-known legal battle over the guardianship of Sharon Kowalski. The case is familiar to most members of the GLB community, but what is frequently missed is the underlying cause of the litigation: a default rule that disadvantaged Kowalski's same-sex partner. Part II of this Essay examines what would have happened if Sharon Kowalski had been injured or killed today in a jurisdiction governed by three pieces of recent uniform legislation: the Uniform Health-Care Decisions Act (1993), the Uniform Guardianship and Protective Proceedings Act (1997), and the Uniform Probate Code (1990). This analysis reveals that all three Acts contain default rules that discriminate against members of the GLB community. Part III presents the argument for reform and explores various approaches to the drafting of unbiased rules. Finally, Part IV evaluates and rejects four counterarguments that might be raised against this Essay's proposal to target these discriminatory default rules for long-overdue revision.

²¹ See, e.g., Human Rights Campaign, 2 LAW BRIEFS, Winter 1999, at 1, 1-6 (describing legal developments of concern to lesbians and gay men, but discussing only the following topics: employment discrimination, employee benefits, marriage, adoption, foster parenting, sodomy legislation, military service, freedom of association, HIV/AIDS, student activity fees at universities, and studies of anti-gay bias within the jury system). It should be emphasized that I am referring in this Essay to the GLB political movement within the United States. Developments in other countries are the focus of a separate article on which I am now working.

Mention should be made of Hawaii's recently-enacted Reciprocal Beneficiaries Act, which became law without the Governor's signature on July 8, 1997. See 1997 Haw. Sess. Laws 383. The Act is the first and only piece of legislation in the United States to reverse the types of discriminatory default rules discussed in this Essay, see *infra* notes 50, 55, and 62). Nevertheless, the Act's main purpose was to change many of the *mandatory* rules that had burdened Hawaii's same-sex couples. See 1997 Haw. Sess. Laws 383 § 1 ("The purpose of this chapter is to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law."). Thus, for example, the Act permits same-sex partners in Hawaii to become eligible for health insurance, *id.* §§ 2, 4-9, to create joint tenancies, *id.* § 10, to claim an elective share in each other's estate, *id.* §§ 12-14, to enjoy protections against unintentional disinheritance, *id.* § 15, to file an action for wrongful death, *id.* § 20, and to claim governmental pension benefits, *id.* §§ 31-33.

I. SHARON KOWALSKI AND THE HARM OF DISCRIMINATORY DEFAULT RULES

The bare facts of Sharon Kowalski's case are well-known and can be quickly told.²² She was hit by a drunk driver in 1983 and suffered serious injuries to her body and brain. Her same-sex partner, Karen Thompson, filed a petition to be named Sharon's guardian. A similar petition was filed by Sharon's father. The father won.²³ He refused to believe that his daughter was homosexual, and barred Karen from visiting Sharon in the hospital or at the Kowalskis' home.²⁴ Karen fought the father's appointment as guardian,²⁵ and after spending 7 years and \$225,000 in litigation,²⁶ Karen was eventually named as Sharon's guardian.²⁷

This case is so well-known that it has been included in both of the existing casebooks on law and sexual orientation: Rubenstein's *Sexual Orientation and the Law*,²⁸ and Eskridge and Hunter's *Sexuality, Gender, and the Law*.²⁹ Regrettably, neither of these casebooks identifies the problem that led to the litigation: namely, Sharon's failure to execute a document naming Karen as her potential guardian, and the default rule that this failure triggered.³⁰ Under the relevant state law as it existed in 1983, any competent adult was permitted to execute a document nominating a guardian in the event of future incapacity.³¹ Moreover, the law directed that the person so nominated "shall [be] appoint[ed] . . . unless the court finds that the appointment of the nominee . . . [is]

²² Unless otherwise indicated, the account that follows is taken from *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791-92 (Minn. Ct. App. 1991).

²³ The first round of the litigation ended when Karen Thompson withdrew her petition, expecting that she would have visitation rights. However, the initial guardianship order gave complete control to Sharon Kowalski's father, who terminated Karen's right to visit. This set the stage for the subsequent litigation. See *Guardianship of Kowalski*, 478 N.W.2d at 791.

²⁴ See Tamar Lewin, *Disabled Woman's Care Given to Lesbian Partner*, N.Y. TIMES, Dec. 18, 1991, at A26.

²⁵ See *Guardianship of Kowalski*, 478 N.W.2d at 791.

²⁶ See Kurt Chandler & Carol Byrne, *'I . . . Will Not Let Her Down': Thompson Takes Kowalski Home to Stay*, MINNEAPOLIS STAR-TRIBUNE, Apr. 29, 1993, at A1.

²⁷ See Lewin, *supra* note 24, at A26.

²⁸ See WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 792-800 (2d ed. 1997).

²⁹ See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 789-91 (1997).

³⁰ See *id.* (containing no indication that Sharon Kowalski could have avoided this litigation by executing a document naming Karen Thompson as her potential guardian); RUBENSTEIN, *supra* note 28, at 799-800 (same).

³¹ See MINN. STAT. ANN. § 525.544(1) (West Supp. 1999). This provision dates back to 1973. See 1973 MINN. LAWS, ch. 618, § 5 (adding MINN. STAT. ANN. § 525.544).

not in the best interests"³² of the person on whose behalf the guardianship petition was filed. Thus, if Karen had been nominated in advance, the burden of proof would have been placed upon Sharon's father to show that Karen's appointment was not in Sharon's best interests.³³ But because Sharon had made no nomination, Karen bore the burden of proof: she was required to show that her appointment was in Sharon's best interests. Given societal attitudes in 1983 about homosexuality,³⁴ this showing was extremely difficult for Karen to make—and she did not succeed in making it until 1991.

The Kowalski case is therefore revealing on two fronts. First, the litigation itself shows that failing to act can trigger a default rule with severe consequences for same-sex couples. Second, the way the litigation has been understood by the GLB community, including some prominent GLB academics,³⁵ reflects the community's comparative emphasis on discriminatory mandatory rules and its comparative neglect of similarly harmful defaults.

II. THE KOWALSKI CASE TODAY AND DISCRIMINATORY UNIFORM LAWS

What if Sharon Kowalski had been injured today? Would she be in a better position? The answer, regrettably, is no. Imagine that Sharon's accident has just happened, and that Sharon resides in a state that has enacted all of the legislation promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL).³⁶ Three acts are of particular relevance: the Uniform Health-Care Decisions Act (UHCDA), the Uniform Guardianship and Protective Proceedings Act (UGPPA), and the Uniform Probate Code (UPC).

³² MINN. STAT. ANN. § 525.544 (1).

³³ See *In re Guardianship of Kowalski*, 478 N.W.2d 970, 973 (Minn. Ct. App. 1991) (stating "the ward's choices may only be denied by the court if found not to be in the ward's best interests").

³⁴ See, e.g., William G. Blair, *Americans Found More Tolerant at the Polls*, N.Y. TIMES, Sept. 1, 1983, at A17 (reporting polling data showing that only 29% of Americans would consider supporting a homosexual candidate for President, compared to 42% for an atheist candidate, 77% for a black candidate, 80% for a female candidate, 88% for a Jewish candidate, and 92% for a Roman Catholic candidate).

³⁵ Of course, not all GLB academics have missed this point. See, e.g., Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1347 (1997).

³⁶ For information on NCCUSL, see its website: (last modified Aug. 24, 1999) <<http://www.nccusl.org>>.

A. *The Uniform Health-Care Decisions Act*

Immediately after the accident, medical decisions needed to be made on Sharon's behalf. Today, health-care decisionmaking on behalf of an incapacitated adult is commonly done pursuant to a power of attorney, which allows one person (known as the "agent" or the "attorney-in-fact") to act on behalf of another (the "principal").³⁷ At common law, the death or incapacity of the principal automatically terminated the agent's authority.³⁸ But in recent years, more and more states have provided by statute for the creation of so-called "durable" powers that remain in existence despite the principal's incapacity.³⁹ Durable powers are tremendously valuable planning tools. Among other things, they allow principals to name in advance the caretakers of their affairs in the event of incapacity or serious illness. A special type of durable power is the power of attorney for health care, which allows the principal to name in advance the person who will make medical decisions on his or her behalf.⁴⁰ The permissible scope of this power varies from state to state,⁴¹ but its importance cannot be overestimated. It allows a principal to delegate to a trusted substitute the ability to decide questions literally of life and death.⁴² It also grants a privileged position to the attorney-in-fact: he or she receives "priority of visitation," meaning the right to visit the principal in the hospital and, equally important, to control who else may visit.⁴³

Let us assume that, as in real life, Sharon did not execute a durable power of attorney for health care. State law sometimes provides an automatic backup: a so-called "surrogacy" statute designating certain individuals who are granted the right of access to the incapacitated patient's confidential records and the right to make medical decisions on his or her behalf.⁴⁴ The UHCDA, promulgated by

³⁷ See David M. English, *The UPC and the New Durable Powers*, 27 REAL PROP. PROB. & TR. J. 333, 337 & n.14 (1992).

³⁸ See RESTATEMENT (SECOND) OF AGENCY § 122 (1958).

³⁹ On the rise of durable powers of attorney, see THOMAS P. GALLANIS ET AL., ELDER LAW: READINGS, CASES, AND MATERIALS 209–11, 383–84 (1999); English, *supra* note 37, at 337.

⁴⁰ See generally T.P. Gallanis, *Write and Wrong: Rethinking the Way We Communicate Health-Care Decisions*, 31 CONN. L. REV. 1015, 1029–31 (1999).

⁴¹ For a discussion of some of the differences in state law, see CLAIRE C. OBADE, PATIENT CARE DECISION-MAKING: A LEGAL GUIDE FOR PROVIDERS § 11.1 (1998).

⁴² See *id.*

⁴³ See Marina T. Sarmiento, *The Legal Needs of Women With HIV*, 9 BERKELEY WOMEN'S L.J. 155, 158 (1994).

⁴⁴ See OBADE, *supra* note 41, § 11.3 (discussing surrogacy statutes), § 15.2 (explaining

NCCUSL in 1993, provides for such an arrangement.⁴⁵ In the absence of any designated agent, section 5(b) of the UHCDA lists, in a descending order of priority, the people who may serve as a health-care surrogate:

- (1) the [patient's] spouse, unless legally separated;
- (2) an adult child;
- (3) a parent; or
- (4) an adult brother or sister.⁴⁶

If none of these people is available, the Act permits medical decisions to be made by "an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values."⁴⁷ Applying these provisions to the facts of Sharon Kowalski's case, a hospital would accept instructions from Sharon's father, not from Karen. Only if Sharon's father were dead or unavailable might Karen be permitted to make decisions on Sharon's behalf.

B. *The Uniform Guardianship and Protective Proceedings Act*

Let us pretend that Sharon's condition has now deteriorated to the point in which it is necessary to seek a guardian. Guardianship is a protective arrangement designed to safeguard the personal or property interests of individuals with diminished capacity.⁴⁸ Unlike the private delegation of authority under a power of attorney, the appointment of a guardian occurs pursuant to a court order.⁴⁹ In 1997, NCCUSL promulgated a revised version of the UGPPA,

the surrogate's right of access to the patient's medical records).

⁴⁵ See UNIF. HEALTH-CARE DECISIONS ACT § 5(b) (1993), 9 U.L.A. (PART I) 327 (Supp. 1999).

⁴⁶ *Id.*

⁴⁷ UNIF. HEALTH-CARE DECISIONS ACT § 5(c).

For Hawaii's approach, see HAW. REV. STAT. § 323-2 (1998) ("A reciprocal beneficiary . . . of a patient shall have the same rights as a spouse with respect to visitation and making health care decisions for the patient.").

It should also be noted that, even without a surrogacy statute, spouses are often allowed by medical custom to make health-care decisions for each other. See GEORGE J. ANNAS, *THE RIGHTS OF PATIENTS: THE BASIC ACLU GUIDE TO PATIENT RIGHTS* 90 (1989). This traditional practice is not without legal risks, and it is therefore not surprising that instances arise in which litigation-averse providers refuse to follow a spouse's instructions. But when a doctor's medical and ethical duties are not in conflict with the wishes of the patient's spouse, those wishes are frequently honored. Some doctors might extend this sphere of discretionary decision-making to a domestic partner, but being dependent on a particular doctor's good grace is a precarious position.

⁴⁸ See generally GALLANIS ET AL., *supra* note 39, at 259–79.

⁴⁹ See *id.* at 259–60.

which addresses the issue of guardian selection in section 310(a).⁵⁰ That section instructs the court to consider candidates in the following order:

- (1) a guardian . . . currently acting for the respondent . . . ;
- (2) a person nominated as guardian by the respondent . . . in a durable power of attorney . . . ;
- (3) an agent appointed by the respondent . . . ;
- (4) the spouse of the respondent . . . ;
- (5) an adult child of the respondent;
- (6) a parent of the respondent . . . ; and,
- (7) an adult with whom the respondent has resided for more than six months before the filing of the petition [for guardianship].⁵¹

If we assume, as in the real case, that Sharon made no nominations, her father would occupy a higher position of priority than Karen. And Karen would only occupy any position in this hierarchy if she can prove that she and Sharon resided together for more than six months before the guardianship petition was filed.⁵²

C. The Uniform Probate Code

Eventually, Sharon will die. Let us pretend that she has done so, not having executed a will.⁵³ For decedents in this position, state law provides a one-size-fits-all default: a statute of descent and distribution that parcels out property

⁵⁰ UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 310(a) (1997), 8A U.L.A. 104 (Supp. 1999).

⁵¹ *Id.*

⁵² On the under- and over-inclusiveness of this provision, see *infra* note 75 and accompanying text. It should be noted that a different subsection of the UGPPA gives the court the power to reject the higher-ranked father of Sharon Kowalski in favor of Karen Thompson if doing so would be “in the best interest” of Sharon. See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 310(b) (1997), 8A U.L.A. 104 (Supp. 1999), but this would only return Karen to the same disadvantaged position she occupied in the *Kowalski* case itself. For Hawaii’s approach, see, for example, HAW. REV. STAT. § 560:5-311(b)(1) (1998) (treating “spouse” and “reciprocal beneficiary” alike).

⁵³ Wills are among the primary documents used to determine the distribution of assets at death. The growth in so-called “will substitutes,” such as life insurance, pension plans, and joint bank accounts, may now be giving the will a run for its money as *the* “major instrument for disposition of wealth at death,” (a phrase which appears in the General Comment to Part 5 of the pre-1990 version of the Uniform Probate Code, see JOHN H. LANGBEIN & LAWRENCE W. WAGGONER, SELECTED STATUTES ON TRUSTS AND ESTATES 547 (1995)), but there can be no doubt of the will’s importance as an estate planning tool. On the rise of will substitutes, see generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

according to a fixed plan.⁵⁴ Under the intestacy provisions of the 1990 UPC, a surviving spouse, if there is one, inherits all or most of the decedent's estate.⁵⁵ In the absence of a surviving spouse, the intestate estate passes to the decedent's descendants if any survive, otherwise to other members of his biological or adoptive⁵⁶ family such as parents, siblings, and the like.⁵⁷ Under this statutory scheme, if Sharon was survived by her father and by Karen, the father would inherit all of Sharon's intestate estate. The UPC would not entitle Karen to receive even the tiniest share.⁵⁸

III. REFORM: WHY AND HOW?

A. *The Rationale for Reform*

Why do these three rules in particular cry out for reform? The answer is that they are not fulfilling their stated objective: to mirror what Sharon and others like her would have done if they had executed the appropriate documents. According to the official Comments, each of these three default rules is explicitly designed to mirror the likely intent of the patient,⁵⁹ ward,⁶⁰ or decedent.⁶¹ Admittedly, the aim is not perfection in every case, because that would necessarily entail a

⁵⁴ For intestacy as a default regime, see, for example, RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.1, cmt. c (1999).

⁵⁵ See UNIF. PROBATE CODE § 2-102 (1990), 8 U.L.A. (PART I) 81 (1998).

⁵⁶ The effect of adoption on inheritance is controlled by section 2-114(b). See UNIF. PROBATE CODE § 2-114(b).

⁵⁷ See UNIF. PROBATE CODE § 2-103.

⁵⁸ For Hawaii's reform of the UPC's intestacy provisions, see, for example, HAW. REV. STAT. § 560:2-102 (1998) (treating "spouse" and "reciprocal beneficiary" alike).

In states other than Hawaii, it is theoretically possible that a court might interpret the word "spouse" in the UPC to include a domestic partner, as the UPC itself does not define this term. Such an interpretation would be consistent with the recently promulgated *Restatement of Property*, which suggests that the word "spouse" in an intestacy statute could be interpreted as applying to a domestic partner. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.2 cmt. g (1999). However, no court interpreting the UPC has yet taken this step.

⁵⁹ See UNIF. HEALTH-CARE DECISIONS ACT § 5 cmt. (1993), 9 U.L.A. (PART I) 328 (Supp. 1999) (describing subsection (b) as a "default rule" that "incorporates the presumed desires of a majority of those who find themselves so situated").

⁶⁰ See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 310 cmt. (1997), 8A U.L.A. 104 (Supp. 1999) (explaining the high priority given to an agent "on the theory that the agent is the person the respondent would most likely prefer to act").

⁶¹ See UNIF. PROBATE CODE § 2-102 cmt. (1990), 8 U.L.A. (PART I) 82 (1998) (justifying changes in the amount of property passing to the surviving spouse in intestacy by referring to the probable intention of the decedent).

complicated factual investigation into the party's individual intent.⁶² But the aim is to achieve reasonable results in most cases, and so NCCUSL has drafted the existing acts to provide for different outcomes in different situations. Consider, for example, the UPC's provisions on intestacy. If a decedent dies without a will, the UPC provides that the intestate estate will be distributed differently depending on the size of the estate and whether or not there is a surviving spouse, whether or not there are surviving children, whether those children are related to the decedent or to the decedent's spouse or to both, whether or not there are surviving parents, whether or not there are surviving siblings, and so on.⁶³ In other words, NCCUSL has recognized that decedents would want the pattern of estate distribution to vary depending on these factors. Indeed, within the last decade NCCUSL has modified the UPC's intestacy provisions in an effort to replicate more closely what most decedents would want and to keep up with public attitudes about intestacy, which have changed over time.⁶⁴

Unfortunately, NCCUSL has been slow to recognize that the uniform laws as they currently exist have the effect of discriminating on the basis of sexual orientation because they contain default rules that do little or nothing to replicate the likely intent of members of the GLB community.⁶⁵ Part II of this Essay illustrated the gap between Sharon Kowalski's desires and the outcomes under uniform legislation, and the same gap would occur with respect to any ward, patient, or decedent with a same-sex partner. Moreover, the problem is not limited to those members of the GLB community who happen to have partners. Under the uniform laws discussed in Part II, in the absence of a spouse it will typically be the parents who are entrusted with decisionmaking authority,

⁶² See, e.g., UNIF. HEALTH-CARE DECISIONS ACT § 5 cmt., 9 U.L.A. (PART I) 328 (Supp. 1999) (stating that "[l]ike all default rules, it is not tailored to every situation").

⁶³ See UNIF. PROBATE CODE §§ 2-102 to 2-103 (1990), 8 U.L.A. (PART I) 81, 83 (1998).

⁶⁴ Compare, for example, UNIF. PROBATE CODE § 2-102(1)(ii) (1990), 8 U.L.A. (PART I) 81 (1998) (giving the entire intestate estate to the surviving spouse even if there are surviving descendants, as long as "all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent"), with UNIF. PROBATE CODE § 2-102 (1969) (revised 1990), 8 U.L.A. (PART I) 274 (1998) (giving the entire intestate estate to the surviving spouse only "if there is no surviving issue or parent of the decedent"). For a second example, compare UNIF. PROBATE CODE § 2-106 (1990), 8 U.L.A. (PART I) 85 (1998) (adopting a representational system of per capita at each generation), with UNIF. PROBATE CODE § 2-106 (1969) (revised 1990), 8 U.L.A. (PART I) 282 (1998) (adopting a system of per capita with per capita representation). Both of these changes were the result of empirical studies of public attitudes toward property distribution. See UNIF. PROBATE CODE § 2-102 cmt., § 2-106 cmt. (1990), 8 U.L.A. (PART I) 81-82, 85-87 (1998).

⁶⁵ A similar argument can be made on behalf of opposite-sex couples who, for whatever reason, are unmarried. But such is not the focus of the present Essay.

guardianship power, or the decedent's property. But there is strong evidence to suggest that members of the GLB community, with or without partners, are often estranged or emotionally distant from their parents.⁶⁶ Many gay men, for example, have "come out" to their parents only after testing positive for HIV, simply because the physical wasting associated with AIDS made it impossible to continue hiding their sexual orientation.⁶⁷ The position of priority given to parents by members of the heterosexual community, and reflected in current uniform law, is thus not necessarily what members of the GLB community would want.⁶⁸ It is therefore inaccurate and discriminatory to proclaim the current legal regime as intent-effectuating when the likely intent of persons within the GLB community has been ignored.

B. Approaches to Reform

How might these default rules, and others like them, be revised so that they no longer discriminate on the basis of sexual orientation? There are two keys to reform. The first is to conduct thorough empirical research to determine the wishes of most members of the GLB community. The second is to translate those wishes into workable legislation.

1. Step One: Empirical Research

Thorough empirical research into the desires of the GLB community is an essential predicate for legislative reform. To the best that I have been able to discover, no empirical research has been done on the community's views with respect to health-care decisionmaking and guardianship,⁶⁹ and only one study has examined the community's attitudes about property distribution at death.⁷⁰ That study, spearheaded by Professor Mary Louise Fellows, was a very good

⁶⁶ See, e.g., Mary Brooks, *When Gays Come Out: How Their Decision Affects Family, Friends, Co-Workers*, ORLANDO SENTINEL, Aug. 9, 1996, at E1 (describing the shock and anger of many parents when their GLB children "come out").

⁶⁷ For a cinematic portrayal of this recurring phenomenon, see AN EARLY FROST (NBC television movie, 1985). I am indebted to Ruth Colker for this point.

⁶⁸ See, e.g., *The Pink, White, and Blue*, GUARDIAN (London), June 4, 1996, (Magazine), at 2, available in LEXIS, News library, Majpap file) ("Gay men describe the agony of tending a sick partner for years, watching him die, and then standing helpless as a previously estranged brother or parent claims the deceased's worldly goods.").

⁶⁹ Multiple searches in the Science Citation Index, Social Science Citation Index, MedLine, BioethicsLine, HealthSTAR, and Periodical Abstracts databases yielded no articles presenting empirical research on these topics.

⁷⁰ See generally Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1 (1998).

start but quite limited in scope: it surveyed 169 residents of Minnesota who considered themselves to be in a same-sex or opposite-sex "committed relationship" and 87 Minnesota residents drawn from the public at large.⁷¹ More empirical work must be done before legislative drafting can begin.

2. *Step Two: Workable Legislation*

Once the empirical research has been completed, advocates for reform can start drafting legislative proposals that would codify the wishes of the GLB community. A number of difficulties may arise in the drafting process, and while this Essay cannot anticipate them all, two of them deserve mention here: the problem of party identification and the dilemma of divorce.

a. *Party Identification*

It is crucial that the legislation reliably identify the person who would have been nominated as beneficiary, health-care surrogate, or guardian if the appropriate documents had been executed. If this person occupies a role that is already defined in law, such as "parent" or "child" or "spouse," then there is little or no difficulty. But what if the person is a "domestic partner" or a "friend" or a "caregiver" (*i.e.*, terms that do not have standard legal definitions)? How should a statute identify this person?

There are two likely methods of identification. One is "self-identification," whereby the law would rely on people to identify their own friends or caregivers or domestic partners. This self-identification process might entail registering with a municipality or state agency, or might involve some other procedure. But in any event, the default rules would depend on some action by the parties themselves.

The second method is "statutory identification," meaning that a statute would identify domestic partners or friends or caregivers by describing their essential characteristics.⁷² One such description is used by the UGPPA, although without much success: among candidates for guardians, as discussed earlier,⁷³ the seventh and lowest priority is given to "an adult with whom the

⁷¹ *Id.* at 9, 32.

⁷² It is theoretically possible that what I have labeled "statutory identification" might instead be accomplished by judicial decision. However, the comprehensive law reform advocated by this Essay is unlikely to arise from case-by-case decisionmaking. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 448-49 (2d ed. 1997) (contrasting the incomplete reform of antilapse law in *Estate of Button*, 490 P.2d 731 (Wash. 1971) with the comprehensive approach of § 2-707 of the Uniform Probate Code).

⁷³ *See supra* notes 51-52 and accompanying text.

[incapacitated person] has resided for more than six months.”⁷⁴ According to the official Comment, this provision is specifically targeted at domestic partners,⁷⁵ but it is far too under- and over-inclusive. Any adult meeting the statutory test qualifies for the seventh priority; but a domestic partner who cannot satisfy the six-month residence requirement does not qualify for the seventh, or indeed any, priority. Other descriptions might or might not work better. One possibility would be to borrow the “holding out” requirement from the law of common-law marriage. At common law, couples could be considered married if, among other things, they held themselves out to the world as man and wife.⁷⁶ Requiring domestic partners or caregivers to hold themselves out as such might well reduce the problem of under- and over-inclusiveness. However, it would also require a detailed factual investigation. This investigation would be relatively unproblematic in the context of intestacy and guardianship, which already involve court proceedings. But the need for fact-finding would create serious difficulties in medical emergencies, in which decisionmaking authority must be transferred quickly from the incapacitated patient to another adult. A second description, which might likewise work for caregivers and domestic partners, would draw on the well-known New York case of *Braschi v. Stahl Association*.⁷⁷ There, the New York Court of Appeals held that the “family” of a deceased tenant included someone “whose relationship [with the tenant] is long term and characterized by an emotional and financial commitment and interdependence.”⁷⁸ This definition might reduce some of the over- and under-inclusiveness of the UGPPA, but like the “holding out” requirement of common-law marriage it is also predicated on a detailed factual investigation.

Between self-identification and statutory identification, which approach is better? On this question, the jury is truly out. Relying on self-identification will work if and only if enough members of the GLB community go through the self-identification procedure. Professor Fellows’s empirical study, referred to earlier,⁷⁹ indicates that in 1996 only about one-third of the committed same-sex couples living in cities with domestic partner registries had taken the trouble to

⁷⁴ UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 310(a)(7) (1997), 8A U.L.A. 104 (Supp. 1999).

⁷⁵ See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 310 cmt. (1997), 8A U.L.A. 105 (Supp. 1999) (“Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent.”).

⁷⁶ For an introduction to common-law marriage, see WAGGONER ET AL., *supra* note 72, at 83–85.

⁷⁷ *Braschi v. Stahl Assoc.*, 543 N.E.2d 49 (N.Y. 1989).

⁷⁸ *Id.* at 54.

⁷⁹ See *supra* note 70 and accompanying text.

register.⁸⁰ This may indicate problems with self-identification *per se*, or it may simply mean that the benefits of registering did not outweigh the burdens. In the latter case, increasing the benefits—by enabling registrants to take advantage of the default rules currently tailored for heterosexuals⁸¹—may induce more people to register.⁸² With respect to statutory identification, the procedure will work if and only if the statute is sufficiently well-drafted so as to avoid substantial under- and over-inclusion. Can this be done? A noteworthy attempt has been made in the area of intestacy by Professor Lawrence Waggoner, who developed a multiple-factor approach to the definition of a “committed partner,”⁸³ but it remains to be seen how well his proposed statute would work if put into practice,⁸⁴ how well it would translate into other areas of the law such as health-care surrogacy or guardianship, and whether it might be extended to members of the GLB community who are not in a domestic partnership.

Ultimately, it is beyond the scope of this Essay to declare definitively whether self-identification works better than statutory identification, or vice versa. Indeed, a combination of the two approaches may be more effective than either approach alone—an option discussed by Professor Fellows⁸⁵ and a point that Professor Waggoner has stressed in letters to law reform organizations.⁸⁶

⁸⁰ See *id.* at 55 (reporting that only 36.3% of the committed same-sex partners living in municipalities with domestic partnership registries had registered).

⁸¹ And tailored best for *married* heterosexuals. See *supra* note 64.

⁸² Or it may not. Hawaii uses a system of self-identification, see HAW. REV. STAT. § 572C-4(5) (1998) (requiring parties who wish to benefit from the 1997 Reciprocal Beneficiaries Act to sign a “declaration of reciprocal beneficiary relationship”), and the Hawaii approach does not appear to have been very successful. Before the law became effective in July 1997, the Hawaii Department of Health had estimated that “as many as 20,000 to 30,000 people might sign up.” See Susan Essoyan, *Hawaii Finds Slow Response to Domestic Partners Law*, DALLAS MORNING NEWS, Dec. 28, 1997, at 5A. But by December 10 of that year, “just 296 couples” had registered. *Id.* Since then, the number has increased only modestly, to 435 as of April 27, 1999. See *Auditor: Cost of Reciprocal Beneficiaries Benefits Minor*, AP, Apr. 28, 1999, available in WL, Allnewsplus file.

⁸³ WAGGONER ET AL., *supra* note 72, at 107–08, reprinted in RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.2 note 5 (1999). For a discussion of an earlier version of this statute, see Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 78–87 (1994).

⁸⁴ The empirical study led by Professor Fellows did not invite participants to comment on Professor Waggoner’s particular proposal, nor does the study speculate on how well the proposal might work if put into practice. But the study does suggest broad support for reform: a “substantial majority” of respondents stated that at least some intestacy rights should be granted to surviving committed partners of the same or opposite sex. See Fellows et al., *supra* note 70, at 38.

⁸⁵ See *id.*, at 26–31.

⁸⁶ Letter from Lawrence W. Waggoner to Janice Henderson-Lipkie (Dec. 11, 1998) (on

Rather, this Essay is aimed at encouraging the formation of a drafting committee—composed of researchers, NCCUSL commissioners, and representatives from the GLB community⁸⁷—to develop the best method of identification, to urge its adoption, and then to monitor how well it works in practice.

b. *Divorce*

The second drafting problem that needs to be mentioned concerns the opposite of identification. Identification is fundamentally about the *acquisition* of status: who is going to be in the privileged position of making decisions, being a guardian, or receiving property? To be successful, however, a proposed statute must also address the *loss* of status. Once a person has been identified as the potential health-care surrogate, guardian, or beneficiary, how is that status to be removed if the future patient, ward, or decedent so wishes?

The answer to this question will depend upon the initial method of identification. A statute that relies on self-identification should also provide a procedure for divorce, a term used here in the broader sense of a relationship being terminated. For example, if self-identification entails registration at a municipal office, a subsequent filing at the same office will probably be sufficient for divorce. (It is worth noting, though, that the statute will have to address ancillary questions, such as how frequently these procedures can be invoked, and whether there should be a waiting period between a divorce and the next registration.) On the other hand, if the law uses a method of statutory identification, the proposed guardian, surrogate, or beneficiary should be described with sufficient precision so that the statute is not likely to give power or property to someone who should no longer occupy a privileged position in law.

As with the problem of identification, the problem of divorce cannot be wholly resolved in this Essay. Instead, a collaboration among researchers, NCCUSL commissioners, and GLB advocates provides the best hope of producing a workable reform of the current law.

IV. COUNTERARGUMENTS AND RESPONSES

The final question that must be addressed is: how persuasive is the case for reform? This last part of the Essay considers, and rejects, four likely arguments

file with author); letter from Lawrence W. Waggoner to Beth Bryant (Mar. 11, 1998) (on file with author); letter from Lawrence W. Waggoner to Stanley C. Kent (Feb. 2, 1998) (on file with author).

⁸⁷ These groups need not be mutually exclusive.

that might be advanced by opponents of reform. The first argument focuses on finite resources, asserting that the movement for same-sex equality has limited funding and time and should not spread itself more thinly by taking on additional work. What this argument overlooks, however, is how many resources are available to the GLB community. In the 1950s, the Mattachine Society⁸⁸ and the Daughters of Bilitis⁸⁹ engaged in path-breaking activism while operating on a shoestring.⁹⁰ Today, the Human Rights Campaign receives more than fourteen million dollars in annual revenue,⁹¹ and there are thousands of other, smaller organizations at the national, state, and local levels.⁹² It is difficult to believe that the modern movement lacks funding, volunteers, or energy for an important law-reform effort.

The second argument, likely to be made by religious conservatives, is that the current default rules have an expressive function⁹³ and should remain on the books as a condemnation of non heterosexuality, even though their application in particular cases can be avoided. This argument merits two responses. The first response emphasizes the point made in Part III: the stated purpose of these default rules is to mirror the probable intention of the party who could have executed a document but failed to do so.⁹⁴ The reforms proposed here simply enable the statutes to do a better job of effectuating intent. The second response observes that the main beneficiaries of the current regime are the lawyers who must be employed to help members of the GLB community reverse the discriminatory defaults. These expenses are nothing more than unnecessary transaction costs. If the default rules were more effective at mirroring intent,

⁸⁸ The Mattachine Society is an organization for gay men founded in New York City circa 1951. See JONATHAN NED KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 412 (rev. ed. 1992).

⁸⁹ The Daughters of Bilitis is an organization for lesbians founded in San Francisco circa 1955. See *id.* at 421.

⁹⁰ See *id.* at 406–33 (using interviews with pioneering activists Harry Hay and Barbara Gittings to describe the early struggles of the gay and lesbian movements).

⁹¹ See Human Rights Campaign, *Five Year Financial Summary*, (visited Nov. 17, 1999) <<http://www.hrc.org/hrc/anrept98.html>> (showing the receipt of \$14,394,722 in revenue and support during the 1997–1998 fiscal year).

⁹² See, e.g., Queer Resources Directory, (Nov. 17, 1999) <<http://www.qrd.org>>.

⁹³ I would like to thank Evan Caminker, a fellow visitor at Michigan during the Fall 1998 semester, for alerting me to the expressive consequences of law reform—although I hasten to add that he did not put forward the conservative argument as I have framed it in the text. For a sample of academic writings on law's expressive function, see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

⁹⁴ See *supra* notes 59–64 and accompanying text.

these costs would be reduced or eliminated. In light of the public's dim view of the legal profession,⁹⁵ an anti reform argument that accomplishes little but the wasteful enrichment of lawyers is not likely to carry the day.

The third argument accepts the wisdom of default-rule reform but questions its effect on the movement for same-sex equality as a whole: opponents of reform might seize on the default rules as a compromise position, thereby leaving in place the discriminatory mandatory rules that are the current focus of change. Admittedly, this is a theoretical possibility. All negotiations have risks,⁹⁶ and the political negotiation at the heart of law reform is no different.⁹⁷ Nevertheless, the elimination of discriminatory defaults would be a significant improvement on the status quo, and it would still enable—indeed, it might empower—advocates to press for further progress.

The fourth argument laments the existence of discriminatory default rules but doubts that law reform is the best remedy; instead, perhaps an educational campaign should be launched to inform members of the GLB community about these rules so that people can execute the documents necessary to override the defaults.⁹⁸ This argument is well-intentioned, and there is nothing wrong *per se* with an educational campaign. Indeed, as part of a larger strategy, an educational campaign about the effects of these discriminatory default rules would be welcome. Unfortunately, the available empirical evidence suggests that educational campaigns do not get people to sign legal documents. In 1990, the federal government began requiring health-care providers to educate patients about the importance of living wills and health-care powers of attorney, the idea being that more patients would then understand and execute them.⁹⁹ But recent

⁹⁵ See, e.g., Bill Rankin, *Georgia State Poll Down on Lawyers*, ATLANTA JOURNAL-CONSTITUTION, Sept. 3, 1995, at F1, F14 (reporting that 45% of men and 40% of women surveyed in Georgia in 1995 viewed lawyers as dishonest); Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 (indicating that 31% of people surveyed nationwide in 1993 viewed lawyers as "less honest than other people," up from 16% in 1986).

⁹⁶ See, e.g., Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 239–42 (1993) (discussing the tension between self-interested strategic behavior and the openness required for successful negotiations).

⁹⁷ See Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1266 (1995) ("If politics is the art of the possible, so too is law reform."). The maxim "politics is the art of the possible" has been traced to Otto von Bismark. See Daniel Johnson, *Blood, Iron, and Champagne*, TIMES (London), July 10, 1998, available in LEXIS, News library, Curnws file).

⁹⁸ I would like to thank Sherman Clark for alerting me to this argument, which should not be taken as his own view, and for discussing with me ways to rebut it.

⁹⁹ See Edward J. Larson & Thomas A. Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, 32 WAKE FOREST L. REV. 249,

studies of this legislation's effects conclude that the law has been largely unsuccessful; there has been "little . . . increase"¹⁰⁰ in public awareness and only a "small increase"¹⁰¹ in the number of documents executed. There is no reason to believe that an educational campaign within the GLB community will fare noticeably better.¹⁰²

Taken together, then, these four arguments are unpersuasive and should not deter advocates of equality from championing default-rule reform.

CONCLUSION

The political movement for same-sex equality has focused its law-reform efforts on the mandatory rules that deny equal rights to sexual minorities. These efforts deserve the highest praise and should continue with vigor. Nevertheless, it is high time to devote attention to the default rules that likewise discriminate on the basis of sexual orientation. Under current law, these default rules will operate unless they are overridden by individual action. This approach unjustly burdens members of the GLB community and leaves too many of them vulnerable to the rules' discriminatory application. The stakes are high: Karen spent seven years and a small fortune to become Sharon's guardian, and the same thing could easily happen to other GLB individuals who have not yet reversed the law's discriminatory presumptions. Default rules may not be as visible as their mandatory counterparts, but their effects are no less pernicious. The reform of these default rules is therefore an essential prerequisite to the equal treatment under the law that all members of the GLB community deserve. This reform will not come easily, nor can it be accomplished without the help of national organizations such as the Human Rights Campaign and NCCUSL. These organizations rely heavily on the participation of lawyers and law professors, so reform-minded people of all sexual orientations who are in legal academia or legal practice are uniquely poised to help in this important campaign. Calling upon others in the profession to do likewise, the present author enthusiastically volunteers.

251-62 (1997) (analyzing the legislative history and purposes of the Patient Self-Determination Act of 1990).

¹⁰⁰ *Id.* at 285 (summarizing the empirical literature).

¹⁰¹ *Id.*

¹⁰² An educational campaign is also unlikely to increase the number of people who undergo a self-identification procedure. In Hawaii, for example, the Reciprocal Beneficiaries Act attracted significant news coverage, but surprisingly few couples have registered. *See supra* note 82.

